Supreme Court, U.S.
FILED
APR 1 1992
OFFICE OF THE CLERK

No. 91-1161 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STANLEY CARTER KISER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

FREDERICK F. COHN
205 W. Wacker Drive
Chicago, Illinois 60606
(312) 641-0692
Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-1161

STANLEY CARTER KISER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

1.

The exclusionary rule applies when police officers, who have conducted a seizure of defendant and his luggage in violation of the Fourth Amendment, obtain evidence as

a result of that unlawful seizure, and take evidence thereby obtained to a magistrate, who issues a warrant, based upon such tainted evidence, for the further search of the same luggage by those same officers. In such a situation, exclusion from court of the evidence obtained via such tainted warrant would have a deterrent effect in discouraging illegal police activity, whereas failure to apply the exclusionary rule would encourage official violation of the Fourth Amendment if the fruits of such illegal activity could be used to obtain a warrant which in effect could exonerate the prior illegality.

Certiorari should be allowed for a number of reasons, including:

A. To resolve the conflict as to applicability of the exclusionary rule in such a situation. The position of the Eighth Circuit that it does not apply, as per the instant Opinion, following United States v. White, 890 F.2d 1413 (8 Cir. 1989), directly conflicts with this Court's holding in Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472 (1988), and with the Tenth Circuit's application of United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677 (1984), in United States v. Scales, 903 F.2d 765 (10 Cir. 1990).

B. To prevent implicit judicial eradication of the Fourth Amendment and the exclusionary rule.

Both assertions presented by the government are invalid. The government argues that this Court should not review the instant Opinion of the Eighth Circuit because the Fourth Amendment was not violated in the initial seizure of defendant. (G. Br., pp. 9-11) That the initial seizure was legal was squarely rejected by both State and Federal Courts which have independently decided the issue. In People v. Kiser, 113 Ill.App.3d 501, 447 N.E.2d 858 (1 Dist. 1983), the Illinois Appellate Court held that the search and seizure of defendant was unconstitutional. Any argument that this decision in Kiser is infirm because it pre-dated this Court's recent decision in United States v. Sokolow, 490 U.S. 1, 104 L.Ed.2d 1 (1989), is meritless. The correctness of the State reviewing

court's decision in Kiser was reaffirmed after Sokolow by the decision of the United States District Court, which, upon hearing anew all the relevant testimony, concluded there was no rational suspicion and that the seizure of defendant was therefore unconstitutional. (R. 204)

When reviewing the decision of a District Court, including credibility determinations on motions to suppress, the decision must be affirmed unless manifestly erroneous. Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472 (1988); United States v. Bennett, 908 F.2d 189 (7 Cir. 1990). Surely, the government has not so demonstrated.

The government avoids this Court's holding in Murray v. United States, supra. In Murray, this Court specifically held that where illegally

seized evidence is a factor in the government's decision to obtain a warrant, or in the magistrate's decision to issue the warrant, then the search conducted pursuant to the warrant is constitutionally invalid. The government has not discussed Murray v. United States, supra, in depth. Instead, the government relegates its discussion to a footnote. (G. Br., p. 9, fn. 4) Such avoidance is painfully understand-able, because the definitive teachings of Murray require rejection of the holding of the Eighth Circuit in this case.

Alternatively, the government invokes United States v. Leon, 468 U.S. 897 (1984). (G. Br., pp. 6-9)

To apply Leon to the scenario here--where illegal material is used by the authorities to obtain the search

warrant--is to extend Leon beyond the clear intent of this Court. The Leon Court rejected application of the "good faith" principle to non-warrant search and seizure situations. The holding below authorizes a seizure already accomplished by having the seizure re-done after obtaining a warrant on the basis of the prior illegal seizure. This is improper under Leon and under United States v. Scales, 903 F.2d 765, 768 (10 Cir. 1990), and is totally inconsistent with this Court's holding in Murray.[1]

---

1. Neither in United States v. White, 890 F.2d 1413 (8 Cir. 1989), nor in the instant case, did the Eighth Circuit consider the impact of this Court's decision in Murray, upon Leon.

Certiorari should be granted to resolve this crucial Fourth Amendment question created by the conflict of the decision below with Scales and Murray.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner